Supreme Court, U.S.
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In The

Supreme Court of the United States

JULIAN CHRISTIAN LONG,

Petitioner,

versus

THE STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In response to petitioner's motion to suppress evidence seized with a search warrant, the State claimed that the warrant affidavit demonstrated probable cause, but never claimed that *United States v. Leon,* 468 U.S. 897, 104 S. Ct. 3405 (1984) applied. At the hearing on the motion to suppress, no evidence was taken focused on the issue of whether the issuing officer reasonably believed that the warrant was valid. After the trial court found that the affidavit did not state probable cause and granted the motion to suppress, the State sought supervisory writs, assigning as error only the trial court's finding regarding probable cause. After the Court of Appeal reversed, the defendant sought review by the state Supreme Court, and in that court again the State raised only the issue of probable cause. Despite this, the state Supreme Court made no finding on the issue of probable cause, and instead found that *Leon* applied, without considering the State's burden of proof on the issue.

When the State never, at the trial court, appellate court, or state supreme court, claims that the good faith exception to the exclusionary rule established by *United States v. Leon,* 468 U.S. 897, 104 S. Ct. 3405 (1984) applies, and no evidence is taken specifically directed toward the question, can the state's highest court supply the exception and rule against suppression?

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OPINIONS BELOW

The opinion of the Louisiana Supreme Court from which relief is sought is reported at 884 So.2d 1176, and is reproduced in the Appendix at 1. The decision by the Court of Appeal, First Circuit is unreported and is reproduced in the Appendix at 26. The ruling of the District Court is reproduced in the Appendix at 28. The November 24, 2004 denial of petitioner's request for rehearing by the Louisiana Supreme Court is reproduced in the Appendix at 31.

STATEMENT OF JURISDICTION

The order denying rehearing by the Supreme Court of Louisiana was filed on November 24, 2004, and this petition for writ of certiorari has been filed within ninety days of that date. The Court has jurisdiction to review the decision of the state supreme court pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." *U.S. Const. Amend. IV.*

STATEMENT OF THE CASE

From the time that the defendant filed his motion to suppress, through the hearing, appellate court, briefs, and

Louisiana Supreme Court argument, never once did the State of Louisiana assert that the good-faith exception to the exclusionary rule applied. The Louisiana Supreme Court supplied the exception which the State chose not to use, mis-stated the rule, and then failed to place the burden on the State to prove that its officers acted in good faith. This petition challenges these unwarranted extensions of *Leon*.

On March 13, 2001 Detective Dennis Smith of the Baton Rouge City Police prepared an affidavit to obtain a search warrant for a residence located at 541 Castle Kirk in Baton Rouge. The affidavit contained a description of information provided by a "reliable cooperating individual" and a listing of items taken from the trash in front of the residence. The affidavit is peculiar – it alleges that the defendant is trafficking in marijuana from the residence (without giving *any* specifics whatsoever – not a single "controlled buy," not one allegation of people coming and going from the residence, no suggestion of how this information was obtained, and no indication as to when the trafficking might have occurred) not that there is present in the residence a quantity of drugs. The affidavit looks more like an arrest warrant affidavit than a search warrant affidavit. The affidavit's language about information received from informants is short:

> Affiant informs the court that in March, 2001, affiant was contacted by a reliable cooperating individual, hereafter referred to as CI. CI advised that Julian Christian Long and John Haarala were trafficking in marijuana from their residence located at 541 Castle Kirk. CI further advised that Long transported large quantities of marijuana from Texas to Louisiana for distribution in the Baton Rouge area, assisted by

> Haarala. CI could provide no other information. Affiant informs the court that affiant is familiar with Long and has in the past received information from two independent sources identifying Long as a person involved in the transportation and trafficking of marijuana.

Later, the affidavit states "Affiant informs the court that CI is considered reliable based on providing information regarding narcotics trafficking in the Baton Rouge area which affiant knows to be true and correct." The remainder of the affidavit provided the following information:

1) That Detective Smith had "conducted several surveillances of the residence," and during those surveillances had identified the vehicles present at the residence as belonging to Long and Haarala, and had seen Long and Haarala present at the residence.

2) That on March 13 Detective Smith retrieved a portion of the garbage which was out on the street for collection, and inside the garbage found an empty box of gallon sized plastic bags and a stem, which based on his experience Detective Smith claimed to be from a marijuana plant[1]. The trash also revealed prescriptions identifying Haarala as the patient. The affidavit claimed that the plastic bags "are utilized by traffickers in the packaging of large quantities of marijuana."

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[1] The stem was introduced in evidence at the hearing, and is approximately one inch long. Detective Smith identified it as marijuana, although no scientific testing of the stem was conducted. The Louisiana Supreme Court referred to the exhibit as "a portion of a cured marijuana plant of the kind that is bought and sold in the drug trade." 884 So.2d at 1182. It is unknown where this information came from, since no evidence was received about what kind of marijuana plants are bought and sold in the drug trade.

The affidavit provided no information from which the issuing Judge could determine for himself the credibility of the informant or the reliability of his information. Instead, the affidavit provided no information as to *how* the informant knew that defendant was trafficking in marijuana from the residence. The affidavit did not reveal whether the informant saw the marijuana himself, heard about it from someone else, or just guessed it. The affidavit provided no information as to *when* the informant claimed that marijuana was inside the house – Officer Smith admitted that from the affidavit it was impossible to tell whether the marijuana was claimed to be present last week or last year. The affidavit did *not* state that the informant claimed that marijuana was present in the house at the time of the warrant application. The blanket statement that the defendant was trafficking marijuana was all the informant could provide – the affidavit stated that "CI could provide no other information." Officer Smith admitted in his testimony that it was impossible to tell from the affidavit whether the marijuana claimed to be trafficked from the residence was there now, or ten years ago. Proceedings of February 12, 2003 at p. 7. Officer Smith claimed that the first informant was "reliable," but provided no specific facts from which the issuing Judge could make his own determination about the informant's credibility.

Officer Smith's own evaluation of the quality of the informant's information is interesting:

> Q: In fact, sir, this affidavit tells the Judge – not only does it not tell the Judge that it doesn't know when the marijuana was there or how the confidential informant knows it was there, in fact, does it not affirmatively

> say the opposite? That, in fact, the C.I. could provide no other information. The C.I. has no other information other than what you've listed on this report of what you told the Judge, correct?
>
> A: That's what I prepared in the warrant, yes, sir.

Proceedings of February 12, 2003 at pp. 7-8. With regard to the affidavit's mention of "two independent sources identifying Long as a person involved in the transportation and trafficking of marijuana," it is clear that the issuing magistrate was provided nothing to allow him to judge the credibility of these sources or the reliability of their information, much less precisely what they knew, when they knew it, and whether they provided any information about marijuana being present in the residence at the time of the warrant application. These sources amount to little more than rumors.

If Detective Smith's informants were to be believed, defendant was engaged in the distribution of large quantities of marijuana. Smith was able to confirm that defendant lived at the residence, but he admitted that this information was readily available to anyone in the telephone book. Nothing about the fact that the defendant lived in the house corroborated anything relevant about the informants' tip. Detective Smith then conducted "several surveillances" of Mr. Long's house. He testified that at no time did he ever see anything during his surveillance that would suggest that any sort of crime was being committed in the residence:

> Q: In fact, you saw nothing in this – or there's nothing in this document about people coming and going or carrying packages or going

in with something and coming out with packages? That's not in this paper, is it?

A: No, sir.

Q: There's nothing in here to suggest there's any kind of unusual traffic in or around the house, is there?

A: That's correct.

Q: There's nothing in here to suggest any kind of commercial activity, legal or illegal, at 541 Castle Kirk, from this document, is there?

A: Not on those surveillances, no sir.

Proceedings of February 12, 2003 at p. 9. Smith found a "stem" in the trash, which he did not test in any way but testified was marijuana. It could not be determined from the affidavit what day trash was picked up in the neighborhood, making it impossible to tell from the affidavit how long the trash containing the stem had been on the street. 34 hours elapsed between when Officer Smith sought the warrant and when he executed it. Proceedings of February 12, 2003 at p. 15.

The same Officer Smith that prepared the warrant affidavit then presented it to the Judge for signature. There is no evidence in the record to suggest that Officer Smith sought or obtained any other person's advice as to whether or not the information in the affidavit was sufficient to establish probable cause to search the residence. Indeed, there is no evidence in the record to suggest that anyone other than Officer Smith and the issuing Judge ever saw the affidavit. There is no evidence in the record that Officer Smith provided any information to the issuing Judge other than what is contained in the affidavit, or

that the issuing Judge did anything more than sign the warrant.

The search warrant was executed on defendant's residence, and a quantity of marijuana as well as a handgun were recovered. A separate, warrantless seizure of marijuana occurred immediately prior to the execution of the search warrant when a vehicle driven by someone who had just left defendant's residence was stopped at another location and marijuana was discovered inside. This ruling regarding this seizure is not made part of this petition.

After an evidentiary hearing at which Detective Smith was the only witness, the trial court granted the motion to suppress. The State sought supervisory writs from the Court of Appeal, First Circuit. That court granted the State's writ application by a 2-1 vote, reversing the trial court's ruling. The defendant then sought supervisory writs from the Louisiana Supreme Court, which granted the writ application and set the case for argument. Thereafter, the Louisiana Supreme Court affirmed the Court of Appeal ruling, with the Chief Justice and one Associate Justice dissenting, and another Associate Justice dissenting in part. Defendant's application for rehearing was denied, and this timely petition for certiorari follows.

ARGUMENT

At no time – not in the trial court, not in the Court of Appeal for the First Circuit, and not in the Louisiana Supreme Court – did the State ever suggest that the good faith exception found in *United States v. Leon,* 468 U.S. 897, 104 S. Ct. 3405 (1984) should apply. The defendant

noted in his post-hearing memorandum that the State was not relying on *Leon*, and the State never disagreed. The State sought review from the Court of Appeal *only* as to whether the affidavit demonstrated probable cause. Its assignment of error read:

> Did the trial court commit reversible error when it failed to find sufficient probable cause in the affidavit presented by Officer Dennis Smith to Judge Carl Guidry to obtain a search warrant to search defendant's home and the vehicles located there?

In defendant's writ opposition to the Court of Appeal, defendant specifically noted that "The State has not claimed that the 'good faith' exception to the exclusionary rule applies here . . . ." The Court of Appeal granted the State's writ and reversed the ruling granting the motion to suppress, finding that probable cause existed. In its brief to the Louisiana Supreme Court, the State again did not so much as suggest that it was relying in any way upon *Leon*. Again, it argued only that the affidavit demonstrated probable cause.

Despite this, the Louisiana Supreme Court asserted the good faith exception on the State's behalf, and then found that Detective Smith reasonably relied on the search warrant's validity. The court made no mention of the fact that the State had not asserted the exception, and the word "burden" appears nowhere in the opinion. The

court expressly did not decide whether the warrant affidavit was sufficient to show probable cause.[2]

The exclusionary rule still exists, and evidence seized in violation of the Fourth Amendment may not be admitted in the State's case-in-chief unless some exception applies.

Leon did not abolish the exclusionary rule, it created an exception to it. This Court's opinion in *Leon* repeatedly referred to the resulting doctrine as "the good-faith exception," and has subsequently used the same language in other cases. *Illinois v. Krull*, 480 U.S. 340, 355, 107 S. Ct. 1160, 1170 (1987). Lower courts uniformly refer to *Leon*'s rule as the "good faith *exception*" to the exclusionary rule. Petitioner suggests that this choice of language is no accident. The exclusionary rule is alive and well, and in the absence of some exception to its application it prevents the introduction of evidence taken in violation of the Fourth Amendment: "When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure." *Illinois v. Krull*, 480 U.S. 340, 347, 107 S. Ct. 1160, 1165 (1987).

The Louisiana Supreme Court did not start with the general rule that evidence seized in violation of the Fourth Amendment should be suppressed unless some exception

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[2] Petitioner shows that on this record, *Leon* cannot apply. However, it is fundamentally unfair to petitioner to have *Leon* decided on this record, since given a fair opportunity and notice that the State is claiming *Leon*'s benefit, petitioner would have been able to introduce evidence on the subject.

applied. Instead, the Louisiana Supreme Court went straight to the fact that a warrant was issued, and held that since a warrant existed the evidence was admissible unless one of the limitations set forth in *Leon* were shown to exist. It is a small but telling point that the Louisiana Supreme Court referred to "*Leon's* good faith *rule*" as opposed to referring to the doctrine established by *Leon* as the "good faith *exception*" (emphasis added).

In *Leon*, this Court made it clear that exclusion still exists as a remedy for a fourth amendment violation: "We do not suggest, however, that exclusion is always inappropriate in cases where an officer has obtained a warrant and abided by its terms." 468 U.S. at 922, 104 S. Ct. at 3420. *Leon* provided an exception to the exclusionary rule in place and applicable to the states since *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684 (1961). Under *Leon*, if a search warrant is constitutionally infirm, suppression may be avoided if there is a finding that the officers involved in the search acted in objective good faith.

By failing to raise *Leon* in the suppression hearing or on appeal, the State has waived this exception to the exclusionary rule.

The preservation of the claims and defenses of any party are the responsibility of that party. Criminal law is an adversary process. Each side makes tactical choices, sometimes giving up rights in the process of seeking a particular result. It is singularly difficult for an appellate court looking at a cold record to second guess counsel's tactical decisions, and both the federal and Louisiana courts have adopted rules which require all parties to assert their positions or have them deemed to be waived.

Beyond this, like any other issue the question of the good faith of the officers requires input in the form of evidence. In any endeavor involving the submission of evidence, the party to whom the burden of proof is assigned must come forward with evidence sufficient to support a finding of the matter asserted.

Here, in response to the defendant's motion to suppress the State *chose* not to assert any claim that the police officers acted in good faith in seeking and executing this search warrant. This tactical decision has two consequences. First, petitioner shows that the State waived the application of *Leon*'s good faith exception through a failure to assert it in the trial court. Second, because the State chose not to rely upon the good faith exception, the State did not introduce any evidence directed at the issue of the executing officer's good faith.

Like many states, Louisiana has adopted procedural rules which require certain matters to be asserted by either the State or the defendant at certain times in a criminal proceeding, at the risk of waiver. For example, if Christian Long had chosen not to file a motion to suppress, the evidence against him would have been admitted at trial regardless of any constitutional violations committed by the police officers who seized it. Louisiana Code of Criminal Procedure Article 703 requires that a motion to suppress be filed in accordance with Louisiana Code of Criminal Procedure Article 521, which requires motions to be filed within fifteen days of arraignment. Article 703(f) provides in part that "Failure to file a motion to suppress evidence in accordance with this Article prevents the defendant from objecting to its admissibility at the trial on the merits on a ground assertable by a motion to suppress."

The result would be no different in federal court. The law is replete with examples of situations where failure to act results in waiver, whether it is failure to object to proffered evidence, or failure to assign error in an appellate brief. Under this Court's jurisprudence a criminal defendant claiming that his inculpatory statement was obtained in violation of his Fifth Amendment rights is barred from federal habeas corpus relief pursuant to 28 U.S.C. § 2254 if he failed to object to the introduction of his statement at this trial. *Wainwright v. Sykes*, 434 U.S. 880, 98 S. Ct. 241 (1977). Indeed, the Rules of this Court permit the consideration of only those questions set forth in the petition for certiorari. Supreme Court Rule 14.1(a). "We have consistently declined to consider issues not raised in the petition for a writ of certiorari." *Caspari v. Bohlen*, 510 U.S. 383, 388, 114 S. Ct. 948, 952 (1994).

Allowing claims like this to be raised for the first time on appeal – and then as here for the first time in the court's opinion, since the State did not assert the good faith exception in its brief or argument to the Louisiana Supreme Court – does violence to both the burden of proof and to the defendant's fair opportunity to counter the evidence. The State certainly should have no greater ability than the defendant to avoid the consequences of failure to assert a claim or raise an issue.

The State made a tactical choice not to present any evidence directed at the issue of good faith, and to not make any argument at any level that *Leon*'s good faith exception applied. There could be any number of reasons why the State might choose not to raise *Leon* and explore the issue of good faith. For example, the State might well have preferred to force a decision on probable cause, since many courts now turn first to the issue of good faith when

considering motions to suppress.[3] Or perhaps there was some evidence regarding good faith that the State did not wish to explore; since the State did not raise the exception, there was no reason for counsel to explore anything beyond the four corners of the warrant affidavit. The State's reasons for not raising *Leon* are irrelevant here – certainly the State had a full and fair opportunity to assert this claim.

The decision not to raise the good faith exception to the exclusionary rule could not have been a mere oversight. Counsel for the defendant, when discussing what procedure he expected to be followed at the motion to suppress, stated that he believed at the hearing the warrant affidavit would be examined to determine whether it demonstrated probable cause, and then "We're going to find out whether or not there's any other exceptions available to the State in the event that you find that it doesn't demonstrate probable cause to allow the search to stand." Proceedings of January 27, 2003 at p. 8. Defendant's post-hearing memorandum *expressly* noted that the State was not relying on *Leon*, as did his briefs at every level of the appellate courts. The State still chose not to raise *Leon* in its appeal to the Court of Appeal for the First Circuit, or in its response to the defendant's writ application with the Louisiana Supreme Court.

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[3] In *United States v. Craig*, 861 F.2d 818, 820 (5th Cir. 1988) the court noted "Principles of judicial restraint and precedent dictate that, in most cases, we should not reach the probable cause issue if a decision on the admissibility of the evidence under *Leon* will resolve the matter."

The burden is on the State to prove that the "good faith" exception applies.

This Court has never held that *Leon*'s exception to the exclusionary rule is "automatic" in the sense that if a search warrant is obtained, the officer's "good faith" necessary to its application is to be presumed. To the contrary, both this Court's jurisprudence and the caselaw from the lower courts make it clear that the burden is on the State to prove the facts necessary to show that the officers reasonably relied upon the search warrant. In *Groh v. Ramirez*, 540 U.S. 551, 563, 124 S. Ct. 1284, 1293 (2004) this Court stated "It is incumbent on the officer executing a search warrant to ensure the search is lawfully authorized and lawfully conducted." The lower courts have likewise so held. "The government bears the burden of proving that reliance upon the warrant was objectively reasonable." *United States v. Kow,* 58 F.3d 423, 428 (9th Cir. 1995)

Here, the State neither claimed that *Leon* applied nor introduced any evidence specifically directed at the issue of good faith. Nevertheless, the Louisiana Supreme Court interpreted *Leon* as self-executing by ruling that if a search warrant is obtained, then the evidence seized pursuant to it is admissible unless the defendant shows that one of the four examples given by this Court where an officer could not reasonably rely on a warrant exist – in other words, unless the defendant proves that the officers were *not* in good faith. The Louisiana Supreme Court treated *Leon* as a rule, not as an exception to a rule. In so doing, the Louisiana Supreme Court impermissibly supplied the exception to a party that did not seek it, and impermissibly lifted the burden of proving good faith from the shoulders of the State, instead requiring the defendant

to prove facts to show that the officers were *not* in good faith. This was error.

It is clear that this Court never intended good faith to be presumed, but instead requires that it be proven by the State. It is the State's burden to prove the officer's good faith, by the introduction of evidence sufficient to show that the officers reasonably relied upon the warrant. In *United States v. Michaelian*, 803 F.2d 1042, 1048 (9th Cir. 1986) the court stated: "The government, not the defendant, bears the burden of proving that its agents' reliance upon the warrant was objectively reasonable." "The standard to be employed is an objective one and the prosecution bears the burden of proof." *United States v. Hendricks*, 743 F.2d 653, 656 (9th Cir. 1984). The Fifth Circuit directly considered the question of whether the government has the burden of establishing good faith in *United States v. Gant*, 759 F.2d 484, 487 (5th Cir. 1985), and stated:

> The government contends that it should not have been required by the district court to bear the burden of demonstrating that the law enforcement officers' reliance satisfied the good-faith exception. We disagree. Although we reserved the question of burden allocation when we decided *Williams*, 622 F.2d at 847, the Supreme Court implicitly resolved the question in *Leon*. The Court noted that "[w]hen officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time." 104 S. Ct. at 3422. Once the defendants convinced the district court that probable cause was lacking, the government was required to prove that the evidence seized during the search was nevertheless admissible because of the officers' objectively reasonable reliance on the warrant.

The State's failure to raise the good faith exception resulted in an evidentiary hearing that did not consider the question.

Leon's application is fact-specific, and many facts outside the content of the affidavit and the warrant can bear on the issue of good faith. Under Louisiana's procedure, because the search of the home was conducted with a warrant the defendant seeking suppression of the evidence seized bears the burden of proof at the suppression hearing.[4] However, for *Leon*'s exception to the exclusionary rule to apply, the State must prove that a reasonable officer in the same circumstances, having a reasonable knowledge of what the law permits, would believe the warrant to be valid. Objective good faith is necessarily determined by the facts available to the officer, which are not limited to the four corners of the warrant affidavit.[5] Unless the State

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[4] Louisiana Code of Criminal Procedure article 703(d) provides that "On the trial of a motion to suppress filed under the provisions of this Article, the burden of proof is on the defendant to prove the ground of his motion, except that the state shall have the burden of proving the admissibility of a purported confession or statement by the defendant or of any evidence seized without a warrant."

[5] Facts beyond the warrant affidavit can be determinative of the issue of good faith, yet would ordinarily not be considered in a hearing where *Leon* is not at issue. At the hearing, the judge ruled that the evidentiary hearing was limited to the four corners of the affidavit. Transcript of February 12, 2003 Proceeding at p. 19. Had the State claimed that suppression was inappropriate even if the affidavit did not establish probable cause due to the objectively reasonable reliance on the warrant's validity by their officer, extrinsic evidence would not only be admissible – it could be critical. For example, though not rising to the level of a *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978) issue, the issuing judge was not told that despite the informant's claim that the defendant was trafficking significant quantities of marijuana from the home, the several surveillances of the home never revealed anything suggestive of criminal behavior. Had *Leon* been asserted by the State, the failure to inform the issuing judge about this would have

(Continued on following page)

raises the issue of good faith as an exception to the exclusionary rule, there is no need for the defendant to explore the issue at the suppression hearing. The shifting of the burden from the State to the defendant on the issue of good faith, and the supplying of that exception to the State without its request, prevented the defendant from exploring the issue at the hearing.

No evidentiary hearing was held on the issue of whether the executing officer acted in reasonable good faith because the State did not raise the issue. At the hearing on defendant's motion to suppress, the State did not introduce the type of evidence frequently seen where *Leon* is an issue. Starting with *Leon* itself, this Court recognized that facts beyond the affidavit and warrant can bear on the question of the objective good faith of the officers. In *Leon*, the state trial court that heard the motion to suppress made a specific finding that the officer who sought and obtained the search warrant acted in good faith. The evidence that supported this finding included the fact that before the application was presented to the judge who ultimately signed it, the "extensive application was reviewed by several Deputy District Attorneys." *Leon*, 468 U.S. at 902, 104 S. Ct. at 3410.

Since the State chose not to rely upon *Leon* to avoid suppression, the State did not introduce any evidence specifically focused on the question of the good faith or not of its officer. The jurisprudence demonstrates the kinds of facts that have been found useful in determining whether

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been explored. It is not possible to determine objective good faith from this record, when because of the State's failure to claim the good faith exception to the exclusionary rule, the hearing did not extensively cover areas outside of the affidavit.

an officer reasonably relied on a search warrant. For example, in *United States v. Cook*, 854 F.2d 371 (10th Cir. 1988) at the hearing on the defendant's motion to suppress, beyond introducing the affidavit and warrant the government established that the officer had taken the affidavit to a deputy district attorney who had reviewed and approved the affidavit, and that the officer had prepared at least thirty or forty affidavits for search warrants previously. The officer's level of experience was also explored. The court criticized the government's efforts to establish good faith:

> The Government's elicitation of facts at the suppression hearing was anemic at best. Even so, combined with the facts stated in the affidavit, we believe that the record demonstrates that a reasonably well-trained law enforcement officer would not have known that the search was illegal [assuming it was] despite the magistrate's authorization, as contemplated in *Leon,* 468 U.S. 897, 104 S. Ct. 3405, 82 L.Ed.2d 677. The detective's reliance on the legality of the warrant was objectively reasonable.

854 F.2d at 373. Here, because of the State's choice not to pursue *Leon* as a means of avoiding suppression, the evidentiary showing was less than "anemic." The State did not introduce any evidence specifically directed at the issue of whether its officer was in good faith. Compare this with, for example, the description of information received at the suppression hearing in *United States v. Corral-Corral*, 899 F.2d 927, 938 (10th Cir. 1990): "At the suppression hearing, Kohler was questioned extensively regarding his expertise, the information he received from Wyoming, the reasonableness of the assumptions he made and his conversations with the state municipal judge."

Some courts have found that an officer's consultations with prosecuting attorneys is evidence of good faith. *See Ortiz v. Van Auken*, 887 F.2d 1366 (9th Cir. 1989); *Arnsberg v. United States*, 757 F.2d 971 (9th Cir. 1985). Such actions have been characterized as "compelling evidence" of good faith. *Wadkins v. Arnold*, 214 F.3d 535, 542 (4th Cir. 2000). Here, there is no evidence that Detective Smith spoke to anyone other than the judge who signed the warrant, and there is no evidence about anything he discussed with the judge.

The fact that the issuing judge was willing to sign the warrant cannot answer the question presented; by definition every case involving *Leon*'s application to a warrant involves a situation where a magistrate has signed the warrant. The proposition that the fact that the officer seeks and obtains a judge's signature on the warrant is per se evidence of good faith was considered and rejected by this Court in the context of a qualified immunity issue in *Malley v. Briggs*, 475 U.S. 335, 345-46, 106 S. Ct. 1092, 1098 (1986):

> We also reject petitioner's argument that if an officer is entitled to only qualified immunity in cases like this, he is nevertheless shielded from damages liability because the act of applying for a warrant is *per se* objectively reasonable, provided that the officer believes that the facts alleged in his affidavit are true. Petitioner insists that he is entitled to rely on the judgment of a judicial officer in finding that probable cause exists and hence issuing the warrant. This view of objective reasonableness is at odds with our development of that concept in *Harlow* and *Leon*. In *Leon*, we stated that "our good-faith inquiry is confined to the objectively ascertainable question

> whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." 468 U.S., at 922, 104 S. Ct., at 3420, n. 23. The analogous question in this case is whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant. If such was the case, the officer's application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest. It is true that in an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it. But ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should. We find it reasonable to require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment.

(footnotes omitted). *See also* LaFave, *Search and Seizure* § 1.3(f) (2d ed. 1987), pages 76-77 (the reasonableness of an officer's decision to seek a warrant "is to be judged as of the time of warrant application and thus without consideration of the fact that the magistrate thereafter acted favorably upon the affidavit presented"). Considering the issue of whether the fact of the issuance of a warrant is evidence itself of the officer's objective reasonableness, the California Supreme Court answered in the negative:

> The fact that a magistrate has issued a warrant – in other words, the fact that an officer sought and obtained advance judicial approval for the

> search – is what caused the high court to establish the *Leon* exception in the first place. By definition, in *every* case in which the prosecution seeks the benefit of *Leon,* a magistrate has issued a warrant; issuance of the warrant defines the class of cases eligible for nonexclusion under the *Leon* rule. Because issuance of a warrant is a constant factor in these cases, it cannot logically serve to distinguish among them. Moreover, it is clear that the high court does not intend the issuance of a warrant to be a consideration under *Leon.* We thus conclude that in determining whether a case is within the third *Leon* situation, the fact that the warrant issued is of no significance.

People v. Camarella, 54 Cal. 3d 592, 605, 818 P.2d 63, 70-71 (1991).

Here, the State did not introduce any evidence specifically directed at the issue of the reasonable good faith of its officer. This is understood fully only with the realization that the State has the burden of proving good faith. Perhaps just as importantly, the defendant did not have an opportunity to explore the issue of whether the officer had a reasonable belief in the validity of the search warrant. Because ours is an adversarial system, even when the State has the burden of proof, the defendant has an important role to play in this inquiry.

The Louisiana Supreme Court also modified *Leon* by apparently removing the requirement of objective good faith. The court's very first statement about *Leon* demonstrates this: "The United States Supreme Court has held that evidence seized pursuant to a warrant based on less than probable cause need not be suppressed if the officers who executed the warrant believed it to be validly issued."

884 So.2d at 1180. The test is not whether the officer believes the warrant to be validly issued – instead the test is whether a reasonable officer, having access to the same facts, would have a reasonable belief in the validity of the warrant.

By supplying the good faith exception to the exclusionary rule when the State did not seek it, and by an application of *Leon* which failed to recognize that the State had the burden of proof, the Louisiana Supreme Court erred. The language used suggests that the court interprets *Leon* as asking only whether the search was made pursuant to a warrant, after which it is up to the defendant to demonstrate one of the four criteria in *Leon* for which suppression could still be appropriate. Tellingly, the court failed to quote *Leon*'s language showing that even with an affidavit that is not "bare bones," the reviewing court properly considers whether the issuing judge properly granted the warrant:

> Even if the warrant application was supported by more than a "bare bones" affidavit, a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances, or because the form of the warrant was improper in some respect.

468 U.S. at 915, 104 S. Ct. at 3416 (citation omitted).

CONCLUSION

The Louisiana Supreme Court erred in considering the good faith exception on this record, and in finding that the evidence in the record supported the application of that exception. Petitioner therefore asks this Honorable Court to grant his petition and reverse the judgment of the Louisiana Supreme Court.

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SUPREME COURT OF LOUISIANA.

No. 2003-KK-2592.

STATE OF LOUISIANA

VERSUS

JULIAN CHRISTIAN LONG.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, PARISH OF EAST BATON ROUGE

VICTORY, J.*

This case elicits as its primary issues both the relevancy of the exclusionary rule when the police are in possession of a valid search warrant and the discretion a trial judge is afforded in ruling on a motion to suppress evidence. After a close examination of the record and a thorough review of applicable law, we find that the exclusionary rule such as was formulated in ***Mapp v. Ohio***, 367 U.S. 643, 81 S.Ct. 1684, 6 L. Ed. 2d 1081 (1961), and its progeny was not triggered when a law enforcement officer executed a valid search warrant upon which he reasonably relied. Additionally, we find that the trial judge abused his discretion in suppressing evidence that was obtained by a search conducted without a warrant, pursuant to the "automobile exception."

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* Judge James C. Gulotta, retired, sitting for Associate Justice Chet D. Traylor, recused.

FACTS AND PROCEDURAL HISTORY

In March 2001, Officer Dennis Smith of the Baton Rouge Police Department was contacted by a confidential informant ("CI") with information that the defendant, Julian Long, and his roommate, John Haarala, were trafficking large amounts of marijuana from Texas to their residence at 541 Castle Kirk Street in Baton Rouge. After receiving this tip, Officer Smith placed the Castle Kirk address under surveillance and seized several bags of garbage from outside of the residence.

Officer Smith prepared a search warrant affidavit based on the information he gathered from his surveillance and examination of the garbage. In his affidavit, Officer Smith stated that the CI "advised that Julian Christian Long and John Haarala were trafficking in marijuana from their residence . . . [and] that Long transported large quantities of marijuana from Texas to Louisiana for distribution in the Baton Rouge area, assisted by Haarala." Although the affidavit acknowledged that the "CI could provide no other information," Smith maintained that the "CI is considered reliable based on providing information regarding narcotics trafficking in the Baton Rouge area which affiant knows to be true and correct."

Officer Smith further stated in his affidavit that he "is familiar with Long and has in the past received information from two independent sources identifying Long as a person involved in the transportation and trafficking of marijuana." The affidavit did not contain further information regarding either the officer's familiarity with the defendant or the basis for the information supplied by the two unidentified sources. Officer Smith conducted surveillance on the residence on several occasions and confirmed

that the defendant and Haarala resided there and that vehicles registered to the two men were located in front of the home.

Officer Smith also included in his affidavit the fact that he had seized from the defendant's garbage the stem of what he believed to be a cured marijuana plant.[1] He further stated he had retrieved from the garbage an empty box of gallon-sized plastic bags, which he knew from experience were often utilized by traffickers in the packaging of large quantities of marijuana, as well as two prescriptions for medication with co-defendant Haarala's name on them.

After review of the affidavit by a magistrate, a search warrant was issued for the Castle Kirk address. Before he executed the search warrant, however, Officer Smith observed a male individual arrive at the residence in a maroon Ford truck. Officer Smith recognized the man as Kevin Francis, who had been described by the unidentified CI as an associate of the defendant. Believing that Francis may have obtained marijuana from the residence, Officer Smith ordered two other officers to initiate contact with Francis after he returned to his residence and exited his vehicle. When Francis exited his vehicle, he was advised of the investigation and read his ***Miranda*** rights, which Francis stated that he understood. The officers then asked Francis whether he had any marijuana, to which Francis

[1] Officer Smith did not perform a field test on the marijuana, but relied on the training and experience in the identification of marijuana that he acquired during his thirteen years as a narcotics officer. According to Officer Smith's testimony, the narcotics division of the Baton Rouge Police Department does not have a field test for the identification of marijuana.

admitted that he had three pounds hidden in a brown paper bag on the rear passenger floorboard of his vehicle.[2] After a search of the vehicle revealed three pounds of marijuana packaged in gallon-sized "Ziploc" bags, Francis divulged that he had obtained the marijuana from the defendant, Long.

After the search of Francis, Officer Smith directed the agents who were still at the Castle Kirk address to execute the search warrant on the defendant's residence. When Officer Smith arrived back at the residence, he observed that a large quantity of marijuana had been found, which was later determined to be twenty pounds. The officers also found a digital scale holding a gallon-sized "Ziploc" bag filled with marijuana and two large black duffel bags filled with approximately sixteen pounds of marijuana. The defendant was advised of his ***Miranda*** rights and indicated that he understood them. He told Officer Smith that the marijuana belonged to him, and he directed them to a backpack and a computer desk that contained more marijuana. The officers also seized approximately $1,050 in cash from the defendant's pants pocket and approximately $660 from Haarala's bedroom.[3]

The defendant was charged by Bill of Information with "Possession with Intent to Distribute Marijuana" and "Possession of a Firearm with a Controlled Dangerous

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[2] Officer Smith, who was the only witness who testified at the suppression hearing, was not on the scene when the marijuana was recovered from Francis. The above-mentioned chain of events was read into the record from the police report at the suppression hearing.

[3] Francis later informed officers that while at the defendant's residence, he had given the defendant $1,050 as payment for two pounds of marijuana he had previously obtained from him.

Substance," and thereafter moved to suppress the evidence seized from his residence on the basis that probable cause had not been established in the search warrant affidavit. The defendant also moved to suppress the evidence seized from the Francis vehicle on the basis that the automobile exception to the warrant requirement did not justify the stop and warrantless search of the vehicle.

The district court granted the defendant's motion to suppress the evidence seized from Long's residence, as well as the evidence seized from the vehicle belonging to Francis. A two-to-one majority of the court of appeal panel granted the State's writ application and reversed, finding that Officer Smith's familiarity with the defendant, the information received from the CI who had provided reliable information in the past, the information collected from the two independent sources, and the items collected from the residential garbage established a substantial basis for the magistrate to find that probable cause existed. ***State v. Long***, 03-1060 (La. App. 1 Cir. 8/11/03). As to the evidence seized from the Francis vehicle, the appellate court simply stated that the evidence was admissible under the automobile exception to the warrant requirement. From this ruling we granted the defendant's writ application. ***State v. Long***, 03-2592 (La. 1/30/04), 864 So.2d 638.

LAW AND ANALYSIS

Search of 541 Castle Kirk

Trial courts are vested with great discretion when ruling on a motion to suppress. Consequently, the ruling of a trial judge on a motion to suppress will not be disturbed absent an abuse of that discretion. *See* ***State v. Horton***,

01-2529 (La. 6/21/02), 820 So.2d 556, 561. Ultimately, however, the appellate courts must determine whether the district court did, in fact, abuse its discretion. In the first issue presented to this Court in the case *sub judice,* the trial court suppressed the evidence obtained during a search of the defendant's home. In the hearing on the motion to suppress, the defendant argued that the information contained in the affidavit was merely conclusory, because it did not provide any basis for determining the veracity and reliability of the CI. The defendant points out that there was no information provided as to how the informant obtained his knowledge regarding the defendant's drug-related activities, or as to when the said activities may have occurred. Additionally, he argues that the information provided by the CI remained uncorroborated when the warrant was issued. We find these arguments unpersuasive and find that the correct standard of review was not applied by the district court in its review of the magistrate's determination of probable cause.

When evaluating whether probable cause exists for the issuance of a warrant, the United States Supreme Court has explained that

> the task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' [citations omitted] that probable cause existed.

Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L. Ed.2d 527 (1983).

Following this line of reasoning, the Court in ***Gates*** decided that a magistrate should examine the "totality of circumstances" that are presented to him in the affidavit by the officer when determining if a Fourth Amendment violation has occurred. ***Id.***, 462 U.S. at 230-231, 103 S.Ct. at 2328. For the following reasons, however, we need not reach a "totality of the circumstances" examination to determine the existence of probable cause.

The United States Supreme Court has held that evidence seized pursuant to a warrant based on less than probable cause need not be suppressed if the officers who executed the warrant believed it to be validly issued. ***United States v. Leon***, 468 U.S. 897, 104 S.Ct. 3405, 82 L. Ed.2d 677 (1984).[4] In ***Leon***, the Court evaluated the costs and benefits of suppressing "reliable physical evidence seized by officers reasonably relying of a warrant issued by a detached and neutral magistrate" and found that "such evidence should be admissible in the prosecution's case in chief." ***Id.***, 468 U.S. at 913, 104 S.Ct. at 3415. In formulating this judicially created good faith rule, the Court reasoned that the good faith of an officer in the execution of a warrant signed by a neutral magistrate should be enough for the evidence obtained as a result of the search to be admissible. ***Id.*** Thus, the Court expressed a strong preference for warrants over warrantless searches by allowing evidence seized in constitutionally

[4] Similar to the United States Supreme Court in ***Leon***, we do not review the issue of whether the search warrant was supported by probable cause and only rule on whether, given the trial court's conclusions, suppression is the appropriate remedy.

questionable searches to be admissible into evidence if the officers were relying on a validly issued warrant.

The Supreme Court justified the creation of a good faith rule by explaining that a search warrant provides a neutral and detached analysis of probable cause by a magistrate rather than the "hurried judgment of a law enforcement officer," and thus should be entitled to reliance by the executing officer. ***Id.***, 468 U.S. at 914, 104 S.Ct. at 3416. Following along these lines, this Court addressed the good faith rule in ***State v. Varnado***, 95-3127 (La. 5/31/96), 675 So.2d 268, 270. In this case we explained that:

> [t]he exclusionary rule "is designed to deter police misconduct rather than to punish the errors of judges and magistrates." ***Leon***, 468 U.S. at 916, 104 S.Ct. at 3417. Its application therefore "must be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness." Id., 468 U.S. at 907 n.6, 104 S.Ct. at 3412 (quoting ***Illinois v. Gates***, 462 U.S. at 257-58, 103 S.Ct. at 2342 (White, J. concurring in judgment)). As a general rule, "an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." ***Leon***, 468 U.S. at 916, 104 S.Ct. at 3417.

Varnado, 675 So.2d at 270. However, we also have ruled that a law enforcement officer's reliance on a magistrate's determination of probable cause is not boundless. In ***State v. Horton***, 01-2529 (La. 6/21/02), 820 So.2d 556, this Court, citing ***Leon***, decided that suppression was the appropriate remedy only if:

> (1) the affiant misled the magistrate by including in the affidavit misleading statements which the affiant knew were false or would have known were false, except for reckless disregard for the truth; (2) the magistrate abandoned his neutral and detached role; (3) the affiant was so lacking of indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) the warrant was deficient and could not be presumed valid. 468 U.S. at 914-914, 104 S.Ct. at 3405.

Applying these factors to the current case, we find that the record contains no evidence of any misleading statements that were contained in the affidavit presented to the magistrate. Additionally, there was no evidence that the issuing magistrate abandoned his neutral role in his issuance of the search warrant, nor was there on the face of the warrant anything that would make the warrant so deficient that it could not be presumed valid. Thus, in order for the exclusionary rule to be the proper remedial mechanism in the case *sub judice,* the affidavit provided by Officer Smith must have been "so lacking in the indicia of probable cause as to render official belief in its existence entirely unreasonable."

Leon's good faith rule recognizes that "an officer cannot be expected to question the magistrate's probable cause determination," but also presupposes that the police have a "reasonable knowledge of what the law prohibits." ***Id.,*** 468 U.S. at 919-921, 104 S.Ct. at 3419. It is necessary, then, to examine what information was provided by the officer to the issuing magistrate in order to determine if a "reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." ***Id.,*** 468 U.S. at 922, 104 S.Ct. at 3420.

The instant affidavit stated that the CI's knowledge of defendant's drug-smuggling activities was consistent with what the officer knew of defendant's history through two independent sources. Thus, the affiant had an independent basis for believing the report to be true, and this knowledge corroborated the informant's report and bolstered his reliability. *See* ***State v. Dazet***, 378 So.2d 1369 (La., 1979). In ***Illinois v. Gates***, the Supreme Court determined that "[s]ufficient information must be presented to the magistrate to allow that official to determine probable cause" and that "his actions cannot be a mere ratification of the bare conclusions of others." 462 U.S. at 239, 103 S.Ct. at 2332. Here, the magistrate was provided with several bases of suspicion, the combination of which provided the magistrate with more than the "bare conclusions of others" from which to determine probable cause. ***Id.*** The affiant, after learning of drug trafficking by the defendant from a reliable confidential informant, and already being independently aware of the defendant's involvement in the drug trade, took the initiative to confiscate the defendant's trash in order to look for additional information regarding the defendant's activities. During this search Officer Smith found a portion of a cured marijuana plant of the kind that is bought and sold in the drug trade. Additionally, he found an empty box of large "Ziploc" bags of the type that Officer Smith knew from past experience was used to store marijuana.

As this court stated in ***Gibson v. State***, 99-1730 (La. 4/11/00), 758 So.2d 782:

> The determination of probable cause, unlike the determination of guilt at trial, does not require the fine resolution of conflicting evidence required at trial, and credibility determinations

> are seldom crucial in deciding whether available evidence supports a reasonable belief that the person to be arrested has committed a crime. Probable cause, as the very name implies, deals with probabilities. The probable cause standard recognizes that a degree of uncertainty may exist and that an officer need not have sufficient proof to convict but must have more than a mere suspicion. The facts need not eliminate all possible innocent explanations in order to support a finding of probable cause. (citations omitted)

Furthermore, in ***State v. Barrilleaux***, this Court decided that there should be "no specific tests to be satisfied by an informant's tip, and the magistrate may issue the warrant when the totality of the circumstances, viewed in a common-sense and non-technical manner, establish 'there is a fair possibility that contraband or evidence of a crime will be found in a particular place.'" 620 So.2d 1317, 1320 (La. 7/2/93) (citing ***Gates***, 462 U.S. at 239, 103 S.Ct. at 2332 (1983)).

In our case, Officer Smith provided the magistrate with information from a reliable confidential informant as well as his own personal knowledge of the defendant's history with narcotics through two separate informants, who corroborated this information. Additionally, he informed the judge of the marijuana plant stem and empty box of "Ziploc" bags found in the defendant's trash. It cannot be said that when all of these factors are taken together Officer Smith was unreasonable in believing that he was providing the magistrate with sufficient information to issue a warrant.[5] Thus, since the facts do not

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[5] *See* ***Illinois v. Gates***, 462 U.S. at 239, 103 S.Ct. at 2332, for further analysis of the "totality of the circumstances" standard which

(Continued on following page)

support that the affiant "was so lacking of indicia of probable cause as to render official belief in its existence entirely unreasonable," the trial court committed reversible error in suppressing the evidence found pursuant to the search warrant of the defendant's home. ***Leon***, 468 U.S. at 914-915, 104 S.Ct. at 3405.

Search of Francis's Vehicle

We turn now to the defendant's argument that the State failed to establish probable cause to search Francis's vehicle. Under the constitution of our state, Long has the standing to challenge the seizure of evidence from Francis insofar as it may have adversely affected him. Article I, Section 5 of the Louisiana Constitution provides: "Any person adversely affected by a search or seizure conducted in violation of this section shall have standing to raise its illegality in the appropriate court." Thus, since Long is adversely affected by the seizure of evidence from Francis's vehicle, the grounds for having done so may be put at issue in Long's defense. *See* ***State v. Culotta***, 343 So.2d 977 (La. 1976).

Following a Motion to Suppress by Long, the district court excluded the evidence obtained from Francis's vehicle finding insufficient evidence to establish probable cause. In his ruling, the trial judge found that the information provided Officer Smith by the CI plus the mere fact that the Francis vehicle was seen at the Castle Kirk street address was not enough to constitute probable cause for a warrantless search. After a review of the relevant

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should be used when determining if probable cause exists in any particular factual scenario.

testimony and evidence in this case, we do not find it necessary to make this determination. Rather, we find that the admission of Francis to the officers concerning the presence of marijuana in his vehicle provided them with sufficient probable cause to search his vehicle pursuant to the "automobile exception" to the warrant requirement.[6]

Generally, in order for evidence to be excluded at trial, an illegal search or seizure must have taken place that resulted its discovery. ***Mapp v. Ohio***, 367 U.S. 643, 81 S.Ct. 1684 (1961). Applying this to our case, either the custodial arrest of Francis or the search of his vehicle must have taken place on less than probable cause in order for the exclusionary rule to pertain. Since the search of Francis's vehicle occurred subsequent to his informing the officers that he was in possession of marijuana, there must have been a preceding seizure of Francis in order for the subsequent search of his vehicle to be considered to have violated his Fourth Amendment rights. In other words, if Francis was "seized" when the detectives informed him that he was under investigation and given his ***Miranda*** warnings, then there is a question of whether probable cause existed to make such an arrest, and the exclusionary rule may apply to the subsequent search of

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[6] A search conducted without a warrant issued upon probable cause is *per se* unreasonable, subject only to a few specifically established and well-delineated exceptions. ***Schneckloth v. Bustamonte***, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973); ***State v. Raheem***, 464 So.2d 293, 295-96 (La. 1985). One of these exceptions pertains to the search of automobiles, in which the inherent mobility of a vehicle and the risk of losing evidence because of this mobility have prompted courts to allow police to conduct an immediate warrantless search with probable cause. ***Maryland v. Dyson***, 527 U.S. 465, 119 S.Ct. 2013 (1999); ***State v. Tatum***, 466 So.2d 29, 31 (La. 1985) (citing ***United States v. Ross***, 465 U.S. 798, 102 S.Ct. 2157 (1982)).

the vehicle.[7] However, if the seizure was not made until after Francis admitted where the marijuana was located, then the search of his vehicle was made subject to probable cause, and the exclusionary rule does not apply.[8] Thus, we must decide at which point Francis was seized for purposes of state and federal law in order to determine whether the product of the vehicle search may be admitted into evidence.

In ***California v. Hodari D.***, the United States Supreme Court held that an individual is not "seized" within the meaning of the Fourth Amendment until that individual either submits to the police show of authority or is physically contacted by the police. 499 U.S. 621, 111 S.Ct. 1547, 113 L. Ed.2d 690 (1991). This Court has expanded this definition to comport with our law, holding that an individual is "seized" under the Louisiana Constitution when he is either "actually stopped" or when the "actual stop" of the individual is imminent. ***State v. Tucker***, 626 So.2d 707 (La. 5/24/93); La. Const. Art. 1, § 5. In ***Tucker***, this Court decided that under Louisiana's slightly broader definition of the term, a "seizure" may occur "when the police come upon an individual with such force that, regardless of the individual's attempts to flee or elude the encounter, an actual stop of the individual is virtually certain." 626 So.2d at 712.

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[7] *See* ***Segura v. U.S.***, where the court held that exclusionary rule reaches not only primary evidence obtained as direct result of illegal search or seizure, but also evidence later discovered and found to be derivative of illegality, or "fruit of the poisonous tree." 468 U.S. 796, 104 S.Ct. 3380, 82 L. Ed.2d 599 (1984).

[8] It is clear that once Francis informed the officers that he was in possession of the marijuana, he provided the officers with sufficient probable cause to search the vehicle.

The U.S. Supreme Court addressed a similar, more relevant, issue in ***Florida v. Bostick***, holding that a seizure does not occur simply because an officer approaches an individual and asks a few questions, as long as a reasonable person would feel free to disregard the police and go about his business. 501 U.S. 429, 111 S.Ct. 2382, 115 L. Ed.2d 389 (1991). In this opinion, the Court stated that even when officers have no basis for suspecting a particular individual of criminal activity, they generally may ask questions of that individual as long as the police do not convey the message that compliance with their requests is required. ***Id.***, 501 U.S. at 436, 111 S.Ct. at 2386; ***State v. Sylvester***, 01-607 (La. 9/20/02), 826 So.2d 1106.[9] The test for whether a "seizure" has occurred, then, "is whether a reasonable person would feel free to decline the officer's request or otherwise terminate the encounter." ***Bostick***, 501 U.S. at 436, 111 S.Ct. at 2386. In deciding what constitutes a "reasonable person," one must look "form the viewpoint of an innocent person in his position." ***Id.***, 501 U.S. at 438, 111 S.Ct. at 2388. Accordingly, the question that this Court must address in determining at what point a seizure occurred is at what instant would police conduct have communicated to a reasonable, innocent person that

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[9] *See also* ***State v. Jackson***, 00-3083 (La.3/15/02), 824 So.2d 1124, 1126 (citing ***People v. Dickinson***, 928 P.2d 1309, 1312 (Colo.1996)) (after police officer observed two men sitting in a vehicle with their heads bent down, his action "of merely approaching the vehicle and identifying himself as a police officer did not implicate the protections of the Fourth Amendment."); *see also* ***United States v. Drayton***, 536 U.S. 194, 200, 122 S.Ct. 2105, 2110, 153 L. Ed.2d 242 (2002) ("Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen.").

he was not free to decline the officer's request or otherwise terminate the encounter.

The two officers, after following Francis to his residence, approached him, told him that he was under investigation for the distribution of marijuana, and advised him of his rights. There is no evidence of any physical contact between the two officers and Francis, nor did the officers order Francis to submit to any of their commands. However, they did exercise their rights to ask questions of Francis after specifically communicating to him that he was not required to answer them. When asked by the officers if he was transporting any marijuana, Francis admitted that he had marijuana in the back seat of his automobile. Only then did the officers take Francis into custody and search his vehicle, thereby discovering the three pounds of marijuana packaged in gallon-sized "Ziploc" bags.

Given these facts, based on the relevant federal and state law, we cannot say that the search of Francis's vehicle was the product of an unlawful seizure. When the officers approached the vehicle, a reasonable, innocent person would not believe that he was under arrest. Thus, the admission that Francis had marijuana in his possession was not the fruit of an illegal seizure, but rather it provided the requisite probable cause for the arrest of Francis and search of his vehicle.

CONCLUSION

For the reasons stated above, we find that the trial judge abused his discretion in suppressing evidence obtained pursuant to a properly executed warrant issued by a neutral magistrate. Officer Smith's familiarity with

the defendant, the information received from a confidential informant and two independent sources, as well as the items found in the defendant's garbage provided Officer Smith with sufficient grounds to execute the warrant in good faith. Additionally, we find that Francis was not seized when he was approached by two officers, read his ***Miranda*** warnings, and informed that he was the subject of an investigation. Being subject to only non-custodial questioning, Francis provided the officers probable cause for a search pursuant to the "automobile exception" by his own admission to being in possession of marijuana.

DECREE

For the reasons stated herein, the judgment of the court of appeal is affirmed and the case is remanded to the trial court for further proceedings in accordance with this opinion.

AFFIRMED AND REMANDED.

GULOTTA, J. (AD HOC), concurring in part and dissenting in part.

I concur in that part of the decision that affirms the ruling of the court of appeal to admit the evidence seized at the defendant's residence.

I respectfully dissent from that part of the decision that also affirms the ruling of the court of appeal to admit the evidence seized from Kevin Francis' vehicle.

Francis parked in front of his residence and exited his vehicle. The police approached him, informed him that he

was the subject of a narcotics investigation, and warned him of his ***Miranda*** rights. Considering these circumstances, I am of the opinion that Francis was under arrest at that point. ***State v. Butler***, 96-1600 (La. App. 4 Cir. 8/27/97); 700 So.2d 224. I conclude that the officers' conduct when they initially approached Francis would have communicated to a reasonable, innocent person that he was not free to decline the officers' request or otherwise terminate the encounter. The initial actions of the police in advising Francis that he was under investigation and warning him of his constitutional rights objectively indicated that the officers intended to impose an extended restraint on Francis's liberty in order to conduct a custodial interrogation. ***State v. Fisher***, 97-1133 (La. 9/9/98); 720 So.2d 1179. These actions, in my opinion, constituted a *de facto* arrest of Francis. ***State v. Hills***, 01-0723, p. 5 (La. 11/08/02); 829 So.2d 1027, 1030. That arrest triggered the Fourth Amendment's requirement of probable cause, which I find lacking. I therefore agree with the trial court's determination that probable cause to arrest Francis did not exist.

Since I conclude that Francis was illegally arrested when he made his admission, the issue then becomes whether the illegality of that arrest so tainted Francis' admission as to require suppression of the evidence seized in the search of his vehicle. Such an admission made after an illegal arrest is valid only when the circumstances show a break in the connection between the illegal arrest and the admission. ***State v. Zielman***, 384 So.2d 359, 363 (La. 1980). Factors to consider in determining whether a break occurred in that connection are: 1) whether the police officers adequately informed the accused that he did not need to comply with their request, 2) the closeness in

time between the arrest and the admission, 3) the presence of intervening circumstances, and 4) the purpose and flagrancy of the official misconduct. ***State v. Mitchell,*** 360 So.2d 189, 191 (La. 1978), *citing* ***Brown v. Illinois,*** 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975).

I conclude that Francis' admission was inextricably linked to the initial illegal arrest. Francis made the admission at the scene of the arrest shortly after the arrest occurred, with no intervening circumstances between the arrest and the admission. Moreover, the record does not disclose that Francis was advised of his right to refuse further contact with the officers. Francis' admission was thus directly connected to his illegal arrest. As such, the evidence seized from the vehicle was subject to suppression as the fruit of the illegal arrest and the tainted admission. In my view, the district court correctly granted the motion to suppress that evidence.

WEIMER, J., concurring.

I agree with the portion of the decision to affirm the ruling of the court of appeal to admit the evidence seized at the defendant's residence.

I concur in the portion of the decision which reverses the suppression of the evidence seized from the automobile of Kevin Francis.

As the majority notes, Detective Smith testified that the confidential informant had told him that Francis was purchasing marijuana from Julian Long on a weekly basis and that he was "presently" distributing marijuana in the Baton Rouge area. While the Long residence was being

watched in anticipation of the imminent execution of the search warrant, Francis entered and then left the residence after a brief visit. The police followed Francis after he left the Long residence. However, he was not stopped. It was not until Francis parked in front of his own residence that the police approached him.

From the police report of that encounter, read into the record at the suppression hearing, after Francis parked in front of his own residence with the police trailing behind, Detectives Devall and Williams approached him and advised him of the investigation and his ***Miranda*** rights, which Francis stated he understood. The officers than asked Francis whether he had any marijuana. Francis replied that he had three pounds of marijuana in a brown paper bag resting on the rear passenger floorboard of his car. The officers retrieved the bag and found three separate packages of marijuana hidden in the brown paper bag. Detective Smith arrived shortly thereafter and described Francis as completely cooperative in the investigation.

The trial court and the parties below all treated the police encounter with Francis as a significant Fourth Amendment event that required probable cause to make it lawful. The trial court expressly found on the basis of the testimony at the hearing that the police lacked probable cause to link Francis with any criminal activity occurring at defendant's residence and that the subsequent search of his vehicle had therefore been illegal. However, the trial court did not expressly state the premise of that finding, that the police had, in fact, stopped or forcibly restrained Francis outside of his own residence before he made his incriminating response and otherwise cooperated in the investigation. As a general rule, the police remain free to

approach anyone in a public place, identify themselves, and then ask a few questions, even ones which may elicit incriminating responses, although they do not have probable cause or reasonable suspicion, as long as the officers do not take the individual into custody or otherwise forcibly restrain him. ***Florida v. Bostick***, 501 U.S. 429, 439, 111 S.Ct. 2382, 2388, 115 L.Ed.2d 389 (1991) ("[T]he proposition that police officers can approach individuals as to whom they have no reasonable suspicion and ask them potentially incriminating questions . . . is by no means novel; it has been endorsed by the Court any number of times.") (citations omitted); ***State v. Sylvester***, 01-0607, p. 4 (La. 9/20/02), 826 So.2d 1106, 1108 (quoting ***Bostick***).

Providing the ***Miranda*** warning was a prophylactic measure designed to protect the defendant's rights. The defendant could have invoked the right to remain silent. Instead, he spoke and incriminated himself.

We must not lose sight of the fact that all of the various analyses were created to aide in making one determination: did the police activity involve "unreasonable searches, seizures, or invasions of privacy." La. Const. art. I, § 5. I find the police did not act unreasonably.

Based on the factors outlined above, coupled with the facts an automobile was involved, Francis incriminated himself, and marijuana was found at the Long residence, I would not suppress the evidence of the marijuana found in the automobile of Francis.

CALOGERO, Chief Justice, dissents and assigns reasons.

For the reasons that follow, I believe the majority opinion errs in finding a "good faith" exception to the exclusionary rule under *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), and then affirming the appellate court's reversal of the district court's ruling suppressing the evidence seized from the defendant's home. The majority opinion further errs in affirming the court of appeal and reversing the district court's ruling suppressing the evidence obtained from the stop of the automobile.

As the district court found, and the majority opinion pretermits review of this finding, the affidavit in this case lacked probable cause and the issuing magistrate did not have a substantial basis for deciding that probable cause existed. Therefore, I do not believe the district court abused its discretion when it granted the defendant's motion to suppress the evidence seized from his home. The court of appeal, consequently, erred in overturning the district court's suppression of that evidence.

Furthermore, in my view, the officer's affidavit was so lacking in the indicia of probable cause as to render official belief in its existence entirely unreasonable. The affidavit lacks any information as to the reliability of the confidential informant (CI) or the basis of his information. The CI's information regarding the defendant, containing as it did only easily-knowable information about the defendant's place of residence, amounts to no more than unsupported allegations of criminal behavior.

The CI's sweeping allegations of large-scale, interstate drug trafficking were not bolstered into probable cause to

search the defendant's home by any of the corroborating information offered in the affidavit. The two anonymous informants, generously characterized by the majority as "separate" and "independent sources," were never identified, and there is absolutely no information as to their reliability or basis of knowledge. Indeed, the officer who obtained and executed the warrant stated in his affidavit that whatever information provided had been received "in the past," and the officer admitted at the motion hearing that he could provide no information about these persons. Furthermore, the surveillance of the defendant's home revealed no suspicious activity of any kind, and the presence in garbage – left in front of the home for weekly service for an unknown amount of time – of the empty box for gallon-sized "ziploc" bags and the untested, one-inch-long plant stem, do not support the CI's allegations of a large drug retailing operation. Thus, there is only the officer's vague assertion in the affidavit that he was "familiar" with the defendant to buttress the accusations of serious criminality made by the uncorroborated CI.

Based on my review of the record evidence, I conclude that, even though the officer secured a search warrant from a neutral magistrate, the officer's belief that the search warrant affidavit contained sufficient indicia of probable cause was not reasonable. Accordingly, I believe the exclusion of the evidence was appropriate, and the district court properly granted the defendant's motion to suppress the evidence seized from his residence.

As to the warrantless search of the Francis vehicle, I agree with the district court that the State failed to establish there was probable cause to search the vehicle belonging to Francis, who was seen leaving the defendant's Castle Kirk residence. Moreover, I disagree with the

majority's finding that Francis was not seized for purposes of the Fourth Amendment prior to his admission.

The courts have consistently held that a search conducted without a warrant issued upon probable cause is per se unreasonable, subject only to a few specifically established and well-delineated exceptions. ***Schneckloth v. Bustamonte***, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973); ***State v. Raheem***, 464 So.2d 293, 295-96 (La. 1985); ***State v. Ruffin***, 448 So.2d 1274, 1277 (La. 1984). Probable cause combined with the inherent mobility of a vehicle, carrying the risk of loss of evidence, underpins the automobile exception and allows police to conduct an immediate warrantless search as thoroughly as could be authorized by a magistrate. ***Maryland v. Dyson***, 527 U.S. 465, 119 S.Ct. 2013, 2014 (1999); ***State v. Tatum***, 466 So.2d 29, 31 (1985), citing ***United States v. Ross***, 465 U.S. 798, 102 S.Ct. 2157 (1982).

In the instant case, there was no probable cause to search the vehicle. The officers searched Francis's vehicle without any articulable reason to believe that marijuana would be located therein. Officer Smith testified that, despite participating in the surveillance with several other officers, he was not in a position to see Francis leave the Castle Kirk residence because he was approximately four or five homes north of the residence. The officer, therefore, did not observe whether Francis carried anything with him to his car before driving away. Nothing in the search warrant affidavit referenced what Officer Smith testified to regarding Francis's involvement with the defendant, nor was there any indication that Francis was acting suspiciously on his way home. Consequently, there was no basis for stopping Francis and searching his vehicle, because, as

the district court reasoned, the information about Francis's alleged involvement with the defendant suffered from the same infirmities as the information regarding the defendant's own activities. Because the illegal stop of Francis tainted the recovery of the three pounds of marijuana from the vehicle, the district court, in my view, correctly suppressed that evidence as well.

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA NO. 2003 KW 1060

VERSUS

JULIAN CHRISTIAN LONG **AUG 11 2003**

In Re: State of Louisiana, applying for supervisory writs, 19th Judicial District Court, Parish of East Baton Rouge, Docket Number 5-01-556.

BEFORE: WHIPPLE, FITZSIMMONS, AND GUIDRY, JJ.

WRIT GRANTED. The trial court's ruling granting defendant's motion to suppress is reversed, and this matter is remanded to the district court for further proceedings. Officer Smith's familiarity with the defendant, the information received from a confidential informant who had provided reliable information in the past, the information collected from two independent sources, and the items collected from the residential garbage of the defendant established a substantial basis for the magistrate to conclude that probable cause existed. *See* **State v. Horton,** 01-2529 (La. 6/21/02), 820 So.2d 556. The evidence seized as a result of the warrantless search is admissible under the automobile exception to the warrant requirement of U.S. Const. Amend. IV; La. Const. art. I, § 5 (1974). *See* **State v. Lopez,** 00-0562 (La. 10/30/00), 772 So.2d 90.

VGW
BMF

GUIDRY, J., DISSENTS AND WOULD DENY THE APPLICATION.

COURT OF APPEAL, FIRST CIRCUIT

/s/ Peggy T. Landry
DEPUTY CLERK OF COURT
FOR THE COURT

STATE OF LOUISIANA	NUMBER 05-01-556 SECTION VI
VERSUS	19TH JUDICIAL DISTRICT COURT
	PARISH OF EAST BATON ROUGE
JULIAN CHRISTIAN LONG	STATE OF LOUISIANA

RULING

The Court currently has two issues before it regarding the Motion to Suppress filed in this matter. Specifically, whether probable cause existed for the issuance of the search warrant for defendant's home on Castle Kirk and whether an exception to the warrant requirement existed to justify the warrantless search of the Francis vehicle.

It is a long standing principal of law that no warrant shall issue unless based upon probable cause, supported by oath of affirmation and particularly describing the place to be searched. *Stage v. Smith,* 397 So. 2d 1326 (1981) It is the task of the judicial officer in determining the existence of probable cause to make a practical, commonsense decision whether, given all the circumstances, set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *State v. Kyles,* 513 So. 2d 265 (1987) Additionally, it is the task of the reviewing Court to insure that the magistrate had a substantial basis for concluding that probable cause existed. *Stake v. Kreitz,* 560 So. 2d 510 (La. App. 1st Cir. 1990)

In reviewing the affidavit in question, the Court finds that the affidavit presented to the Magistrate was based upon a tip from an unidentified informant, whose credibility and reliability was not established. That the affiant's statement in the affidavit regarding his search of the defendant's garbage and discovery of an empty box of gallon sized plastic bags, a marijuana stem and two prescriptions belonging to co-defendant, Haarala, was insufficient evidence to corroborate the informants allegation that the defendants were trafficking drugs from their residence. Further, the affiant's statement, that he was familiar with Long and in the past had received information from two independent sources that Long was trafficking marijuana, contained insufficient details regarding his knowledge of Long and lacked a factual basis from which the Magistrate could rely on the information provided by the independent source.

In light of the totality of the circumstance set forth in the affidavit this Court is unable to find that there was a fair probability that evidence of the crime would be found in the defendant's residence. Therefore, the Court determines that the Magistrate did not have a substantial basis for deciding that probable caused existed and grants the motion to suppress as to all items seized as a result of the issuance of the search warrant.

The second issue before the Court involves the warrantless search of the Francis vehicle. The defendant has argued that no exception to the warrant requirement exist to justify the search of the Francis vehicle. However, the automobile exception to the warrant requirement states that a police officer may search a vehicle when there is probable cause to believe the vehicle contains contraband or evidence of a crime and exigent circumstances require

an immediate search. *State v. Lampton*, 631 So. 2d 523 (La. App. 4th Cir. 1994) Further, the State argues that the information that was provided to the Magistrate in the affidavit warrant for the search of the Long residence in conjunction with the tip from the confidential informant that Francis was involved in drug trafficking with Long and the officers observance of Francis enter the Long home and depart after a short stay provided a substantial factual basis to establish probable cause to conduct a stop of the vehicle.

As stated earlier, this Court finds the information in the affidavit to be insufficient to establish probable cause to search the Long residence. Combining that information with the tip regarding Francis from the same unidentified informant whose reliability has not been established and the officers observation of Francis entering the residence and leaving shortly thereafter with nothing more does not establish probable cause. Therefore the Court grants the motion to suppress as it relates to all evidence seized as a result of the search of the Francis vehicle.

The defendant's Motion to Suppress is granted in its entirety.

THUS DONE AND SIGNED THIS 31 DAY OF MARCH, 2003

Supreme Court of Louisiana

FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE # 088

FROM: CLERK OF THE SUPREME COURT OF LOUISIANA

On the *24th day of November, 2004,* the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

REHEARING(S) DENIED:

2003-KK-2592 STATE OF LOUISIANA v. JULIAN CHRISTIAN LONG (Parish of East Baton Rouge)

Retired Judge James C. Gulotta, participated ad hoc for Traylor, J., recused.

CALOGERO, C.J., would grant a rehearing.

JOHNSON, J., would grant a rehearing.